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CHARLES ELMORE

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1935

No. 346

MATSON NAVIGATION COMPANY (a corporation), THE OCEANIC STEAMSHIP COMPANY (a corporation), and MATSON TERMINALS, INC. (a corporation),

Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, H. G. CATTELL and RAY L. RILEY, the Members of Said State Board of Equalization, and CHARLES J. McCOLGAN, Franchise Tax Commissioner of the State of California,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

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APPELLANTS' PETITION FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The appellants respectfully petition for a rehearing of the above cause, on the following grounds:

The decision rendered denies the constitutional rights of appellants and is, we respectfully submit, inconsistent with doctrines heretofore recognized by this court and with the immunity of interstate and foreign commerce from the burden of state taxation.

This denial and inconsistency become apparent by adding to the statement contained in the opinion the single fact that the state statute had been construed as not applying to any corporation, whether domestic or foreign, which was not actually engaged in business. (*Union Oil Associates v. Johnson,* 2 Cal. (2d) 727.) A corporation may be foreign or domestic; its franchises may include the "right to be a corporation" or "the power to do business in corporate form"; and yet it is not subject to the tax unless it does business. Contrarywise, it must pay the tax if it does business, even though it enjoys neither the "right to be" nor "the power to do business in corporate form" as the result of California law.

In an identical situation this court has held that such a tax is one on the doing of business and not on the right to do business, even though it be called a franchise tax. (*Anglo-Chilean Corporation v. Alabama,* 288 U. S. 318.) Unless this is the rule, the actual effect of a tax may be effectively falsified by a label; and, as this court has often held, this may not be done.

Because the tax here involved is one on business actually done (as in the *Anglo-Chilean* case and for

the identical reason) the problem presented is not reached by the following statement in the court's opinion:

> "Appellants' franchises, including the right to be corporations empowered to do business in corporate form in accordance with California law, were granted to them by the state, and undoubtedly the State may tax the privilege of exercising the franchises. *St. Louis S. W. Ry. v. Arkansas,* 235 U. S. 350, 366-367; *Detroit Bridge Co. v. Tax Board,* 287 U. S. 295."

Granted that these privileges may be taxed, they were not taxed here. This court said, in the *Anglo-Chilean* case, that the *Detroit Bridge* case did not apply to a case where the actual doing of business is taxed. If so, it should not be applied here.

The present tax is not an income tax. (*Pacific Co., Ltd. v. Johnson,* 285 U. S. 480.) It is because it is an excise and not an income tax that it may be measured by the income from tax-exempt securities. (*Pacific Co., Ltd. v. Johnson,* supra.)

Neither is it a property tax, nor one in lieu of property taxes.

We are thus brought to the question whether an excise on business done may be measured by the profits from interstate and foreign commerce by "attributing" some of the interstate and foreign commerce to the local jurisdiction.

In the case of a manufacturing and mercantile business, where goods are made in one jurisdiction and later sold and delivered in another, it is proper to

"attribute" a reasonable part of the ultimate profit to the state of manufacture, and another part to the state of sale and delivery. This was done in *Bass, Ltd. v. Tax Commission*, 266 U. S. 271, and in *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113. Such reasonable apportionment to local activities did not violate the Fourteenth Amendment, and the measurement of the tax by a share of the profit did not amount to a burden on interstate commerce.

The case of a steamship company and its transportation business presents a wholly different situation from these. What it must do and does at its termini—the receipt and discharge of passengers and freight and the making of contracts of carriage—are mere incidents to its essential business of carrying persons and goods in interstate commerce. On the contrary, the factory of the manufacturer and merchant is as local as is his store or warehouse. Transportation may take place from one to the other, but such transportation merely furnishes the connection between the two localized activities. In the case of a steamship company transportation is its sole and only business. A tax on the *business* of transportation is a tax on interstate commerce itself.

This court has said on many occasions that a real burden on interstate commerce cannot be imposed by state taxation. Such a burden is attempted in the present case. The fact that appellants are engaged in wholly separable local activities cannot justify the imposition of such a burden. That these local activities are separable and have nothing to do with the income

of appellants from their transportation business appears from the stipulation of the parties. (R. 60, 61.) There is here no task of separating local from interstate and foreign business, as there was in the *Underwood* and *Bass* cases; the only income in controversy is that resulting from interstate and foreign commerce.

We call attention to the logical consequences of the decision, as follows:

(a) If any local business at all is done, the transaction of interstate business is taxable. Apparently the doing of a purely interstate business does not become free from state control unless the person or corporation engaged in it refrains from any independent local activity;

(b) Although a state may not (we assume) license the doing of interstate business by levies measured by instrumentalities, or number of transactions, it may reach the same result by a tax specifically directed at interstate business and measured by the profits therefrom;

(c) The business, the process of interstate and foreign transportation (as distinguished from property used therein, whether tangible or intangible) may now be taxed, so long as such business is denominated a measure of the value of the right to be, although the right "to be" is enjoyed in many cases without paying the tax and although the tax is paid in many other cases without enjoying the right "to be".

Implicit in the court's opinion, although not expressed therein, is the query why, if net income from interstate commerce may be included in the measure of a general state income tax, it may not also be included in the measure of a tax on the doing of business. To this query the answer seems to be clear and to consist of something more than a fine-spun distinction of theory. A general income tax is direct and akin to a tax on property; it is aimed at all avails of effort and investment; its effect on the process whereby the income is earned is remote and incidental. But an excise on the doing of business is directed at the process itself; it may be measured by income from tax-exempt property because of its very character, as this court has held; but, being directed at the process or activity, it should not be imposed on a business which is immune from taxation. The burden of an excise on the tax-exempt activity is just as real whether it be measured by the number of transactions, or the gross receipts, or the net profits. To say that the burden may be imposed by the device of measurement by net income and not otherwise is, we earnestly submit, to recognize a distinction which is not substantial and not called for by the cases which allow taxes on all property or, by direct levy, on all net incomes.

For a consideration of these questions a rehearing of this cause is respectfully requested.

Dated, San Francisco, California,
March 13, 1936.

HERMAN PHLEGER,
MAURICE E. HARRISON,
HOWARD J. FINN,
GREGORY A. HARRISON,
Counsel for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is presented in good faith and not for delay.

Dated, San Francisco, California,
March 13, 1936.

MAURICE E. HARRISON,
Of Counsel for Appellants and Petitioners.